BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CALIXTO A. GUZMAN	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,022,154
	)	
DOLD FOODS, LLC	)	
Self-Insured Respondent	)	
	)	

ORDER

Claimant requested review of the October 24, 2008 Award for Docket No. 1,022,154 a claim for a low back injury by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on January 16, 2009 in Wichita, Kansas.[1]

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Douglas Johnson, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

Except for the claimant's December 6, 2006 deposition, which is excluded, the Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found that the claimant was entitled to a 5 percent functional whole body impairment for injury to the low back. He denied claimant's request for a permanent partial general (work) disability under K.S.A. 44-510e(a) based upon his factual finding that claimant voluntarily left his employment with respondent. Thus, his disability award was limited to his functional impairment.

[1] This appeal was taken in connection with a companion Award Docket No. 1,022,233. Both claims were tried at the same time, but separate Awards were issued.

The claimant requests review of the ALJ's decision alleging he is entitled to a 95 percent work disability. Claimant maintains respondent failed to act with good faith when it terminated claimant's employment. Thus, claimant argues he is entitled to a work disability based upon a 100 percent wage loss and a 90 percent task loss.

Respondent's contends that the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out facts and circumstances surrounding this claim that are detailed, accurate and supported by the record. The Board therefore finds that it is not necessary to repeat those factual findings in this Order. Suffice it to say, claimant sustained an injury to his low back on February 28, 2005 while he was stacking hides at respondent's beef processing plant. This injury was initially treated conservatively by respondent's medical personnel. Claimant eventually retained a lawyer and was ultimately sent to a physician for an evaluation and treatment.

Claimant was seen by Dr. Eyster who was not only authorized to treat claimant's low back complaints, but her upper extremities as well.[2] Dr. Eyster first saw claimant on July 29, 2005. He noted claimant's low back complaints and observed a good range of motion, no neurological deficits, atrophy or signs of impingement. He did find evidence of spondylolisthesis in the low back and recommended physical therapy. But before anything could be done, claimant was sent elsewhere for an MRI as he was also complaining of right shoulder problems.[3] He was ultimately diagnosed with a torn rotator cuff and surgery was done on January 6, 2006. Claimant's back complaints were treated conservatively with medications and home exercises. Dr. Eyster eventually released claimant and has not offered any opinion as to claimant's permanency with respect to the low back.

At respondent's request, Dr. Paul Stein was retained to evaluate claimant's condition and offer an opinion as to his permanency. Dr. Stein observed a restriction of motion in the low back along with defused tenderness but no muscle spasms. Using the

[2] The claim for the upper extremities is addressed in Docket No. 1,022,233.

[3] The right shoulder complaints are part of Docket No. 1,022,233.

4th edition of the *Guides*[4], Dr. Stein assigned a 5 percent permanent partial impairment.[5] He also assigned restrictions as follows: no lifting more than 50 pounds with any single lift twice per day, 40 pounds occasionally, 25 pounds frequently but not continuously; no repetitive lifting from below knuckle height, no repetitive bending and twisting of the lower back; alternate sitting, standing and walking on a reasonable basis as needed with some change available on at least an hourly basis.[6]

Claimant also presented himself to Dr. Pedro Murati who diagnosed him with low back pain, radiculopathy and bilateral sacroiliac joint dysfunction. He initially assigned a 5 percent impairment relative to claimant's accident. But at his deposition, he indicated that his report should have contained a 10 percent impairment for the low back complaints and an additional 5 percent for claimant's neck complaints. He assigned permanent restrictions of no climbing ladders or crawling, no heavy grasping more than 40 Kg with the right or left, occasional repetitive grasping or grabbing with the right or left, frequent repetitive hand controls with the right or left, no above the shoulder work with the right or left, no pushing or pulling more than 20 pounds, occasionally 20 pounds and frequently 10 pounds, rarely bend, crouch or stoop, occasionally sit, stand, walk, climb stairs, squat or drive, no work more than 18 inches from the body with the right or left, no use of hooks or knives with the right or left, use wrist splints working and at home, alternate sitting, standing and walking, no use of vibratory tools and keyboarding 15 minutes on and 45 minutes off.[7]

After considering the evidence as to claimant's impairment, the ALJ awarded claimant a 5 percent impairment. The Board has considered this aspect of the appeal and finds the 5 percent impairment to the low back should be affirmed. According to Dr. Stein, claimant bears no impairment to his neck as a result of his accident because all of claimant's complaints are subjective in nature and they are not consistent. For that reason, the Board agrees with the ALJ's conclusion that claimant has no permanent impairment in his cervical area. The 5 percent to the low back is affirmed.

When, as here, an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the

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[4] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[5] All ratings in this claim are to the whole body.

[6] Stein Depo., Ex. 2 at 6 (Dec. 6, 2007 IME report).

[7] Murati Depo., Ex. 2 at 5 (Release to Return to work dated May 2, 2007).

> ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But this statute must be read in light of *Foulk* and *Copeland*.[8] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

The dispositive issue in this claim is the fact that claimant was terminated from his employment following his shoulder surgery. To be clear, claimant was off work in order to recover from surgery he received in his other workers compensation claim. But the circumstances of his off-work release and the availability of accommodated work is at the heart of this claim. This is because the parties' good faith is an integral component of establishing a work disability[9]. If claimant's termination was for cause such that claimant's actions were tantamount to a refusal to work, then his recovery is limited to his functional impairment because claimant was earning the same wage he was earning before his injury and does not qualify for a work disability. On the other hand, if the circumstances surrounding claimant's failure to return to work immediately after his shoulder surgery is considered to have been in good faith, then he is entitled to a work disability based upon

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[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[9] Despite the clear signals from recent decisions of the Kansas Supreme Court that the literal language of the statutes should be applied and followed whenever possible, there has yet to be a specific repudiation of the good faith requirement by the Supreme Court. Absent an appellate court decision overturning Copeland and its progeny, the Board is compelled by the doctrine of *stare decisis* to follow those precedents. Consequently, the Board must look to whether claimant demonstrated a good faith effort post injury to find appropriate employment.

an average of his wage and task loss, subject to the *Foulk* and *Copeland* good faith analysis.

The dispute between the parties stems from the release claimant produced following his shoulder surgery and the subsequent releases that were obtained by respondent. The first release claimant received took him off work for two weeks commencing January 6, 2006. Claimant, who does not speak or read English, understood he was to be off work for two weeks. When respondent realized claimant was going to be off for surgery, it inquired of Dr. Eyster if one-armed work could be done. Dr. Eyster issued a release *to respondent* for claimant to perform one-armed work. Claimant maintains he did not ever see this release or understand that one-armed work was available as claimant does not read English, and while respondent's representative testified that he told claimant of the accommodated work duty, his story is somewhat inconsistent.

According to Aaron Peterson, he told claimant that the doctor had issued a revised release and that one-armed work was available. Apparently this was communicated through a translator. But when claimant finally returned to work after the 2 weeks passed, he was brought into Mr. Peterson's office and an investigation into claimant's absence was begun. Mr. Peterson testified that he decided to fire claimant at that time after claimant refused to answer his questions *and refused to tender his work identification*. Mr. Peterson denies that he terminated claimant for his purported failure to appear or call in for the 2 week period. Rather, he maintains claimant was terminated for insubordination.

The ALJ was persuaded by this argument and found as follows:

> It is unfortunate that the [c]laimant was fixated on the first work release slip he received from Dr. Eyster and did not consider any of the subsequent releases whereby he could work light duty using one arm even though several attempts were made by Mr. Peterson and the [r]espondent to explain to the [c]laimant that the restrictions from Dr. Eyster had been changed.[10]

The ALJ went on to find that the claimant was terminated "for cause" and limited his recovery to the 5 percent functional impairment.

The Board has considered this evidence and concludes that claimant's conduct did not constitute a lack of good faith and that respondent's decision to terminate claimant for insubordination demonstrated a lack of good faith. Respondent's decision to fire claimant for failing to turn over his work identification presupposes that he was already fired. And claimant says he answered all the questions that were asked of him during this interview. Given the language barrier and the lack of clarity as to why so many different releases were issued by Dr. Eyster's office, the Board finds that claimant's claim is not limited by

[10] ALJ Award (Oct. 24, 2008) at 6.

respondent's termination of his employment. Thus, this aspect of the ALJ's Award is reversed.

Both Drs. Murati and Dr. Stein offered opinions as to claimant's task loss for the low back condition. According to Dr. Murati claimant bears a 90 percent task loss (27/30 tasks lost). Dr. Stein opined that claimant bears a 80 loss (24/30 tasks lost). The Board finds that claimant bears an 80 percent task loss as a result of his lumbar impairment.

As for the wage loss component of the analysis, claimant's actual wage loss is 100 percent although is it abundantly clear at the regular hearing that he had not made a good faith effort to find appropriate post-injury employment. Claimant testified that in the 18 months since he last worked for respondent (January 2006) he has sporadically looked for work at restaurants and stores, looking most recently just once in the last few weeks before the Regular Hearing.[11] He produced no itemized statement of his job search efforts and testified that when looking for work he gives prospective employers his work restrictions and they respond by telling him there are no jobs available. The Board concludes claimant has not demonstrated a good faith effort to find appropriate post-injury employment. Accordingly, a wage must be imputed to him.

The only evidence within the record as to claimant's wage earning ability comes from Doug Lindahl, a vocational specialist. Mr. Lindahl testified that under Dr. Murati's restrictions, claimant will, at best, be capable of part-time employment, 20 hours per week. Although no physician has restricted claimant in such a fashion, his postural restrictions would, in Mr. Lindahl's view, limit his ability to find full-time employment. Put another way, it is unlikely that claimant can find full-time employment that can accommodate his restrictions. And even at part-time employment, claimant could expect to earn $5.85 an hour.

After considering the evidence bearing on claimant's wage earning capacity, the Board finds that a wage of $5.85 per hour for 40 hours per week should be imputed. This translates to a post injury wage of $234 per week and means claimant has sustained a 61 percent wage loss. No physician has indicated that claimant is unable to work full time, merely that he has restrictions. And the vocational specialist testified that a single employer would be unlikely to accommodate his restrictions. This does not mean that two separate employers could not accommodate his limitations. Moreover, the Board believes the facts suggest claimant is sabotaging his job search by tendering restrictions immediately during the hiring process. For these reasons, the Board finds claimant has a 61 percent wage loss.

[11] Claimant's Depo. (June 16, 2008) at 26.

When the 61 percent wage loss is averaged with the 80 percent task loss, the result is 70.5 percent work disability, effective January 20, 2006, claimant's last day of work for respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated October 24, 2008, is affirmed in part and modified in part as follows:

The claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of $396.65 per week or $8,230.49 for a 5 percent functional disability followed by permanent partial disability compensation at the rate of $396.65 per week not to exceed $100,000.00 for a 70.50 percent work disability.

As of February 18, 2008 there would be due and owing to the claimant 129.32 weeks of permanent partial disability compensation at the rate of $396.65 per week in the sum of $51,294.78 for a total due and owing of $51,294.78, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $48,705.22 shall be paid at the rate of $396.65 per week until paid in full or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of February 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the majority's opinion and would affirm the ALJ's conclusion that claimant acted inappropriately and was terminated for good cause. Thus, his Award should be limited to his functional impairment.[12]

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BOARD MEMBER

c: Stanley R. Ausemus, Emporia, Kansas, Attorney for Claimant
Douglas Johnson, Wichita, Kansas, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge

[12] *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 2d 317, 138 P.3d 790, *rev. denied* 282 Kan. ___ (2006).